No. 16,052

United States Court of Appeals

For The Ninth Circuit

APACHE POWDER COMPANY, a corporation.

Appellant,

v.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, formerly ASHTON BUILDING COMPANY, and MARDIAN CONSTRUCTION COMPANY, corporations engaged in Joint Venture as ASHTON-MARDIAN COMPANY; and THE TRAVELERS INDEMNITY COMPANY, a corporation,

Appellees,

Appeal from the United States District Court for the District of Arizona

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APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

In appellees' brief they respectfully submit that appellant has stated as facts matters which are either contrary to the evidence or upon which the evidence is conflicting and on which the trial court resolved the conflict adverse to appellant's contention.

Appellant admits that it inadvertently made one statement contrary to the evidence, the one that Ashton-Mardian Company required the work to be done by Construction Materials Company to proceed under the same management and with the same personnel and equipment as under the Pioneer Constructors subcontract (R 132), but submits that the significance of the matter is not whether Ashton-Mardian Company made it a requirement, but that the work did proceed under the same management and with the same personnel and equipment.

On the other hand, appellant respectfully submits that appellees have lumped together and confused (1) the facts in evidence which, until March 19, 1957, were known only by Ashton-Mardian Company, Pioneer Constructors, and Construction Materials Company, and were not actually known to appellant prior to March 19, 1957, (2) the facts in evidence actually known to appellant prior to March 19, 1957, and (3) the findings of fact of the trial court which appellant has contended and still contends were incomplete or were not supported by the evidence and are contrary thereto. Appellees also have stated as facts a number of matters which are not supported by the evidence and are contrary thereto, and in presenting facts in support of their arguments have consistently failed to mention other facts which are material and pertinent to the points discussed.

Practically all of the facts in evidence are admitted or are not in dispute, and thus there is little or no conflict in the testimony. It is of utmost importance, however, to determine what facts actually were known to appellant prior to March 19, 1957, in order to decide what notice or information should be imputed to it, if any, and in order to decide what duty, if any, was imposed upon appellant to investigate and ascertain the other facts.

The only way that this can be done fairly and logically is to consider all the facts and circumstances, to marshal the facts in their chronological order, to consider them in their proper relation to each other, and particularly to consider the progressive

development of the of the situation step by step, relating each item of information received by appellant to the situation then existing, and relating successive items of information received by appellant to the situations previously existing and those then existing. Appellant respectfully submits that this has been done by appellant in its opening brief but was not done by appellees in their answering brief, and on the contrary that appellees throughout their arguments consistently have lumped all the facts together.

To avoid repetition, and to call attention to these matters in connection with the arguments to which they are pertinent, appellant will not discuss them as a part of its reply to appellees' statement of the case, but as parts of its reply to appellees' argument.

REPLY TO ANSWER TO ARGUMENT I

The bases of appellant's Argument I are that, as far as appellant knew or was charged with knowing, it was at all times dealing with one subcontractor and was supplying the material to that one subcontractor, that it had only one account with respect to the Ajo job, that all charges for material were made to that one account and all payments were credited to the balance due on that account, that the last of the material furnished on the Ajo job on March 12, 1957, and charged to that account was part of the material for which the claim was made, and that its action was for the balance due on that account.

Appellees' analysis of appellant's Argument I is wholly inaccurate, and the example given of a supplier furnishing material to three different subcontractors, known to the supplier to be different subcontractors, during three successive periods, is absolutely inapplicable. Appellees ignore and attempt to avoid the fact that appellant was informed by Construction Materials Company that it was a division of Pioneer Constructors, and that appellant did not then know Construction Materials Company was claiming to be an independent subcontractor operating under a new subcontract.

Appellees also ignore and attempt to avoid the facts that the only account appellant had on the Ajo job was with Pioneer Constructors (R 214, 215); all the material was covered by factory orders and invoices addressed and mailed to Pioneer Constructors; all the material was shipped to and receipted for in the name of Pioneer Constructors (R 191, 192; Plaintiff Apache's exhibits 3 and 4 in evidence); all the material was charged to Pioneer Constructors and the monthly statements mailed to Pioneer Constructors (R 197); the application of the payments made by Construction Materials Company to Pioneer Constructors' account, and the current balances due on the account, were shown on the monthly statements (R 197, 198); and neither Pioneer Constructors nor Construction Materials Company objected to these applications and balances or claimed that the Construction Materials Company payments should be applied to the payment for the materials furnished after November 1, 1956 (R 197, 208).

In contending the facts do not bear out appellant's argument, appellees state that on December 29, 1956, appellant received a check of Construction Materials Company in the sum of $4,723.37 with remittance instructions that the same was in payment of itemized invoices (Plaintiff Apache's exhibit 11a in evidence; R 284). But appellees failed to state that these invoices were for material ordered, invoiced, shipped, and receipted for in the name of Pioneer Constructors during the month of November, 1956, all prior to December 4, 1956, when Paul A. Swagerty requested that in the future the material be billed to Construction Materials Company. There is absolutely no evidence in the case to the effect that appellant ever was informed, prior to March 19, 1957, that Construction Materials Company took over the work on November 1, 1956. Thus, as far as appellant then knew, the payment of December 29, 1956, was on the account of Pioneer Constructors for material ordered by Pioneer Constructors.

Appellees also emphasize the payments by Construction Materials on Feruary 13, 1957, and April 12, 1957. The February payment was received, with good reason, as another payment on

Pioneer Constructors' account, since the material was invoiced and shipped to and receipted for in the name of Pioneer Constructors. The April payment has no significance because it was made after appellant, on March 19, 1957, discovered that Construction Materials Company was claiming to act as an independent subcontractor under a new subcontract, except that there never was any objection that it was wrongfully applied to the Pioneer Constructors account.

Then on page 12 of their brief appellees state that there are two things which conclusively refute appellant's contention that it applied these payments against the whole of the account and not to the itemized invoices. The first, they say, is the chronological breakdown of the account

> "as furnished to the attorney for appellees by appellant (Defendant, Ashton Company, Inc., Exhibit A in evidence (R 294) and defendant Ashton Company, Inc., Exhibit B in evidence (R 295-296-297)) which shows that the payments were applied against the invoices as instructed."

With respect to the first exhibit, the attorney for appellees is now testifying that the exhibit *as introduced in evidence* was *as furnished to the attorney for appellees by appellant.* There is no such testimony in the record.

On the contrary, Mr. R. L. Henderson, general manager of appellant, on cross-examination by Mr. Catlin, testified (R 221):

> A. No, but let me explain if I may. That from our standpoint the money that we received from Construction Materials on Construction Materials' checks for Pioneer Constructors' powder invoices, from our standpoint we applied that against the balance, the entire balance of Pioneer Constructors.
>
> Q. I don't want to be argumentative; that is not in accordance with this account then because you will note, Mr. Henderson, that the amount paid and shown as paid by Construction Materials here have been shown as being paying individual invoices, isn't that correct?
>
> A. There are some invoices checked off on those.

Q. As being paid by invoices, as being paid by Construction Materials?

A. *There are some checked. Of course, I don't know who checked them.* (Emphasis added by appellant.)

With respect to the second exhibit, Mr. Henderson's letter of April 12, 1957 (R 295, 296, 297), the statement which appellees apparently are referring to is:

"Construction Materials Company's payments cover all shipments delivered since November 1, 1956 with the exception of 30c evidently due to an error in adding the amounts of the last 6 invoices."

This is not a statement that the payments made by Construction Materials Company were credited on the invoices for the material delivered after November 1, 1956, and as shown by Mr. Henderson's testimony given above there was no intention to do so and it was not done.

Furthermore, Hartford Accident & Indemnity Company Exhibit "C" (R 305), showing Apache Powder Company's statement to Pioneer Constructors dated December 31, 1956, shows that the payment by Construction Materials Company on December 29, 1956, of $4,723.37, was credited as "Paid on Account" and credited to the balance of the account. Other monthly statements (Plaintiff Apache's exhibit 5 in evidence) show similar applications of the other payments or credit memos.

The second thing which appellees contend conclusively refutes appellant's assertion that it applied the Construction Materials Company payments against the whole of the Pioneer Constructors account, is their statements and citations of the law with respect to the application of payments.

The basis of this argument is appellees' assumption that the listing by Construction Materials Company on the remittance slips attached to its checks of the numbers of invoices issued to Pioneer Constructors constituted "instructions" to appellant to apply the payment on the invoices listed.

Appellees have assumed the burden and must bear the burden of establishing that the listing of invoice numbers is sufficient to constitute an application of the payment. This they have failed to do. They have not even mentioned this important element of their claim. They also have failed to mention and to avoid the effect of the fact that neither Pioneer Constructors nor Construction Materials Company objected to appellant's application of the payments, as shown by appellant's monthly statements, on the balance due from Pioneer Constructors, or claimed that the payments should be applied to the payment for materials furnished after November 1, 1956.

It also should be noted that Construction Materials Company, although claiming to be an independent subcontractor operating under a new subcontract, and not responsible for the obligations of Pioneer Constructors, never returned the factory orders, invoices, or monthly statements for correction, and never objected to or corrected the bills of lading before receipting for the material. These facts must be considered in construing the effect of its listing the Pioneer Constructors invoice numbers on its check remittance slips.

As shown by the foregoing, appellees have wholly failed to refute appellant's contention that appellant complied with the requirements of the Miller Act.

REPLY TO ANSWER TO ARGUMENTS II, III, AND IV

Before proceeding with their answer to Arguments II, III, and IV, appellees point out what they contend are certain discrepancies in the facts as set forth by appellant and the facts as found by the lower court and the actual testimony as appears in the record of the trial.

In their paragraph 2 on page 15, appellees refer to testimony of Paul Negley, the pencilled notation made by Paul Negley (R 280), and the testimony of Paul A. Swagerty. Appellees state:

"The position of the notations on the pencilled slip and the added computations obviously made after the telephone call in question from Paul Swagerty are of themselves of interest and were probably of great value to the lower court in determining this particular fact."

Appellant does not know what appellees mean by that vague innuendo, but it does know that Paul Negley directly and positively stated (R 243) that Paul A. Swagerty told him that Construction Materials Company, Construction Division, was a division of Pioneer Constructors.

Appellees further state:

"Against the testimony of Mr. Negley, there is, in addition to the physical makeup of the notations above mentioned, the direct testimony of Paul Swagerty denying they were so informed (R 249 to R 260)."

Paul A. Swagerty did testify that he did not recall telling Paul Negley that Construction Materials Company was a division of Pioneer Constructors (R 252), but on cross-examination he said he was not denying that he did (R 254).

In view of Paul Negley's direct and positive statement, not denied by Paul A. Swagerty, and the pencilled note, appellant respectfully submits that there is undisputed evidence that appellant was informed, in connection with the request for a change in the billing, that Construction Materials Company, Construction Division, was a division of Pioneer Constructors.

The fact that the lower court did not include such a finding in its findings Nos. 12 and 16 (R 70, 71, 72), does not warrant the conclusion that the court actually found that appellant was not so informed. And, in any event, having objected to finding No. 12 on the ground that it was not a complete finding of the material facts required by the undisputed evidence, and having objected to finding No. 16 on the ground that it was not supported by the evidence and was contrary thereto, appellant respectfully submits that they should be disregarded in this argument in the light of the record of the trial.

In their paragraph 3 on page 15, appellees apparently miss the purpose and fail to appreciate the importance of appellant's Argument II.

The facts in evidence set forth therein, many of which appellant had no knowledge until March 19, 1957, or until the taking of the deposition of Harold Ashton some months later, were set forth for the express purpose of showing they were such that appellant was given no reason to believe there had been any change in subcontracts or subcontractors, as it would have been under ordinary circumstances with the old management, personnel, and equipment moving out and the new moving in, and the new subcontractor making new arrangements with suppliers for material.

These facts are very important in considering the question whether the information appellant had was sufficient to put it on inquiry and, if so, whether diligent inquiry was made.

Appellees then proceed to deal directly with the question of appellant's notice or knowledge and in their paragraph 1 (a new series) on page 16 they emphasize the fact that Paul A. Swagerty was the person with whom appellant had had almost exclusive contact in the sale and shipment of material to the Ajo job, but they do not point out that Paul A. Swagerty, known to appellant as the purchasing agent for Pioneer Constructors, did not say he was no longer with Pioneer Constructors, or that he then was an employee of Construction Materials Company, or that the Pioneer Constructors subcontract had been terminated and a new subcontract given to Construction Materials Company. In requesting that the billing for that order of December 4, 1956, and future orders be made to Construction Materials Company, Construction Division, Paul A. Swagerty did not say that the work had been taken over by Construction Materials Company as of November 1, 1956. He did say, however, that Construction Materials Company, Construction Division, was a division of Pioneer Constructors, which naturally led appellant to believe that there had been no change in subcontractors or subcontracts.

Then appellees emphasize that in his pencilled note Paul Negley set up the billing in accordance with the request, but it was later changed by instructions from R. L. Hendeson, appellant's general manager. Appellees do not state here that this pencilled note also contained the words, "above is division of Pioneer Constructors," or set forth R. L. Henderson's explanations for changing the notation regarding the billing (R 212, 213, 235). There had been no communications from the offices of either Pioneer Constructors or Construction Materials Company; appellant was not informed that the Pioneer Construction subcontract had been terminated and a new subcontract given to Construction Materials Company; Construction Materials Company had made no arrangements to obtain material; and it was natural to assume that appellant was still doing business with Pioneer Constructors, the parent company.

It is obvious from the foregoing that the appellees are attempting to make their case on a sketchy, unrepresentative selection of the numerous pertinent facts in the record.

In paragraph 3 on page 17, appellees again refer to the receipt by appellant of the check of December 29, 1956, of Construction Materials Company, without setting forth the pertinent facts in connection therewith, which have previously been explained. Appellees also attach great importance to R. L. Henderson's prior knowledge of Construction Materials Company as an affiliate of Pioneer Constructors, seeking thereby to charge him with constructive notice of the distinct legal entities involved. Perhaps, if Mr. Henderson were a lawyer, it ought to have occurred to him to investigate whether he was dealing with separate legal entities, so as to preserve his company's rights in the event of future litigation under the Miller Act. However, Mr. Henderson was not a lawyer, but an ordinary businessman, whose understanding that Construction Materials Company was merely an affiliate of Pioneer Constructors was later reaffirmed by Paul A. Swagerty's telephone statement to the effect that the former was a division of the latter company. Appellees wholly fail to demon-

strate wherein Mr. Henderson's conclusions and assumptions were unreasonable or unwarranted; this they cannot in fact do, for it must be borne in mind that his conclusions and decisions were necessarily predicated upon his actual knowledge at the time, the most significant of which was that the *same people* were continuing to deal with his company and their *same equipment and personnel* remained on the jobsite.

On pages 17, 18 and, 19, appellees cite some phases of the rules of law relating to means of knowledge as notice, and nature of facts exciting inquiry, quoting from *39 Am. Jur., Section 12, page 238* and *39 Am. Jur., Section 15, page 241.* There is no purpose in again citing here the other phases of the rules of law on these subjects cited by appellant in its opening brief. As it is said in the above-mentioned citation from Section 15, it is impossible to lay down a general rule by which to determine what facts are sufficient to excite inquiry. Each case must, to a great extent, be decided on its own facts. And appellees clearly indicate that, after all, the facts in this case determine the issues.

Then, beginning on page 19, appellees give their summation of the information, notice, or knowledge of appellant prior to March 19, 1957, when appellant for the first time was informed of part of the actual situation.

Appellant in its Argument III on pages 29 to 41 of its opening brief has shown in detail the progressive development of the situation step by step, relating each item of information received to situation then existing, and relating successive items of information received and the situation then existing to the previous ones. Appellant again respectfully submits to this Court that this is the only fair and logical method of proceeding to determine what knowledge or information appellant should be charged with, and in applying the rule that notice is imputed only on those facts that are naturally and reasonably connected with the fact known, and of which the known fact or facts can be said to furnish a a clue, mentioned in appellants' citation from *66 C.J.S., Notice,* § *11b(4) (b), at page 646.* Therefore, with respect to appellees

summation of facts, appellant will point out only the most important discrepancies.

On page 19 appellees state that on December 4, 1956, appellant had been supplying blasting material and supplies to Pioneer Constructors from June 13, 1956, on an open account basis under terms requiring payment in cash in 30 days after delivery (R 218), and that it had received no payments whatsoever on this account (R 220, 294). Appellant does not mention R. L. Henderson's reasonable explanation of this situation given in his testimony (R 224, 228, 229, 230, 231), detailed on page 37 of appellant's opening brief. Appellant contends that R. L. Henderson acted in this respect as any reasonably prudent businessman would act.

Appellees further state that on December 4, 1956, appellant received an order from a different corporation with the information that the balance of the material should be billed to that different corporation, Construction Materials Company, Construction Division. Appellees do not mention at this point the other pertinent facts about the relation between the two corporations.

Appellees again refer to the purported phone call from Melvin J. Simmons, which has been fully discussed previously in appellant's earlier brief, and then again refers to the payment by Construction Materials Company on December 29, 1956, without at this point giving the other pertinent facts about it.

It is obvious that appellees here again are attempting to make their case by selecting and correlating a few isolated facts. They are making no attempt to answer appellant's arguments in a fair and logical manner. And, appellant respectfully submits, appellees have not refuted in any substantial way the arguments presented by appellant.

Then appellees greatly emphasize the fact that appellant did not make one phone call, did not write one letter, and did not have one conversation with a representative of either Pioneer

Constructors, Construction Materials Company, or Ashton-Mardian Company before March 19, 1957. They make much of the point that if appellant had done so it would have learned all the actual and pertinent facts.

Appellant submits there was no duty on Mr. Henderson to do so, nor was his failure to do so unreasonable under all the circumstances then known to him. The real duty lay upon both Pioneer Constructors and Construction Materials Company to frankly notify appellant of the true circumstances surrounding their relationship and their subcontract with Ashton-Mardian Company. This they could so easily have done, but for some reason neglected to do, and now it is argued that they gave appellant's personnel sufficient hints and clues to put appellant on inquiry and place it under a duty to investigate. The argument answers itself, but we are compelled to go further.

Appellees failed to set forth R. L. Henderson's reasonable explanations for not phoning or calling one of these companies, and again here appellant contends that Mr. Henderson, under the circumstances, acted as a prudent businessman.

Furthermore, in this connection, appellees neglect to mention or consider the facts that Paul A. Swagerty, the purchasing agent, and Melvin J. Simmons, the secretary and office manager, of Construction Materials Company, apparently desirous of obtaining material on the credit of Pioneer Constructors, did not in their phone calls inform appellant that the Pioneer Constructors subcontract had been terminated, and that Construction Materials Company was acting as a new and independent subcontractor under a new subcontract from Ashton-Mardian Company. In the light of these circumstances, and Paul A. Swagerty's statement that Construction Materials Company, Construction Division, was a division of Pioneer Constructors, appellees' assumption that appellant could have learned the actual and pertinent facts from Pioneer Constructors, of which Melvin J. Simmons was formerly an officer and office manager, and Construction Materials Com-

pany, is not justified. And R. L. Henderson adequately explained (R 228, 229) why he did not contact Ashton-Mardian Company.

Then appellees contend that appellant admitted that the information it had received caused it to give consideration to its future course of dealing on the Ajo job and that, therefore, the real question is not whether appellant had sufficient information or notice to put it on inquiry, but whether it used due diligence in making its inquiry.

In this connection appellant accepts and adopts appellees' quotation from *66 C.J.S., Notice, Section 11b (2), page 645*, which is corollary to appellant's quotation from *66 C.J.S., Notice, Section 11b (4) (b), page 646*, which states that if a person actually makes due inquiry into the circumstances and fails to discover the existence of any rights in conflict, he is to be regarded as having acted bona fide and without notice of the fact.

Appellant has covered this point thoroughly in its Argument III on pages 29 to 41 of its opening brief, and here will only show some of the discrepancies and shortcomings of appellees' attempt to refute the facts and arguments.

Beginning at the bottom of page 19, appellees state:

> "Mr. Henderson, General Manager of the appellant, stated that all that he did was consider the matter, discuss the situation with his accounting department and also have his representatives in the field see if the job was progressing without interruption (R 234)."

This certainly is a misrepresentation of the facts. In the first place, the accounting department kept a check to determine whether the factory orders (R 191), the invoices, and the monthly statements (R 197), which were addressed and mailed to Pioneer Constructors, were returned for correction, and whether the bills of lading were receipted in the name of Pioneer Constructors (Plaintiff Apache's exhibit 4 in evidence). None of the factory orders, invoices, and monthly statements were returned for correction, and all of the bills of lading were receipted for in

the name of Pioneer Constructors. As shown by Defendant Hartford's exhibits B, C, D, and E in evidence, and Defendant Hartford's exhibits F, G, and I in evidence, which contain the Pioneer Constructors invoice numbers, and also as shown by the testimony of Melvin J. Simmons (R 151), the factory orders, invoices, and monthly statements were delivered to Construction Materials Company.

In the second place, the periodic inspections by the Apache Powder Company field men disclosed, not only that the work was progressing without interruption, but that it was being carried on under the same management, with substantially the same personnel, and with substantially the same equipment (R 215), and that nothing occurred in connection with the progress of the work to raise any question as to whether or not there had been a change in subcontractors and subcontracts.

Furthermore, in spite of the fact that Apache Powder Company continued to address and mail its factory orders, invoices, and monthly statements to Pioneer Constructors, and to ship the material to Ajo under bills of lading addressed to and prepared for receipt by Pioneer Constructors, neither Paul A. Swagerty (R 255) nor anyone else again asked that the billing be changed.

All of these facts, and others marshalled in appellant's opening brief, are material and important to the question of whether appellant used due diligence in making its inquiry. And these, coupled with the testimony of R. L. Henderson (R 228, 229) relating to the caution he must use because he was in a competitive position with other suppliers, conclusively show that appellant acted as a prudent businessman under the circumstances.

Appellees point out that the lower court found as a fact that appellant did not act with ordinary prudence in making an investigation under the circumstances. In reply, appellant, who made this finding one of its grounds for appeal, respectfully submits that it has conclusively shown it is not supported by the evidence and is contrary thereto, and is clearly erroneous.

REPLY TO ANSWER TO ARGUMENT V

Appellees admit that the cases cited by appellant in this argument are without doubt the law on the subject insofar at least as they authorize a liberal construction of the statute, but point out, in a quotation from *Bowden* v. *United States For the Use of Malloy, C.C.A. 9th Cir., 1956, 239 F.2d 572, 577,* that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied material to the subcontractor.

Aside from the question of the sufficiency of the notice, treated under Argument VI, appellant here points out that Ashton-Mardian Company had actual notice within less then ninety (90) days after the actual termination of the Pioneer Constructors subcontract, and many months before final payment to Pioneer Constructors was required, of Apache Powder Company's claim. Ashton-Mardian Company agreed to the termination of the Pioneer Constructors subcontract in the latter part of November, 1956, but actually did not terminate it until January 8, 1957, and received oral notice on March 19, 1957, of Apache Powder Company's claim.

Thus, within the time limit fixed by Congress, appellees were actually protected against a double claim, and are seeking by means of a legal technicality to avoid payment of Apache Powder Company's claim.

REPLY TO ANSWER TO ARGUMENT VI

Appellees state that the question involved under this argument is actually twofold in nature, and then proceed to state two questions and unqualifiedly answer each with a no. Neither is complete and the two taken together fail to consider the pertinent facts. The question should be stated as follows:

Is specific and unquestioned oral notice given by a supplier to the prime contractor of the supplier's claim against the subcontractor

sufficient under the Miller Act if such notice is given within ninety (90) days after the delivery of the last of the material to the subcontractor, and if there is written unquestioned evidence of the receipt of the oral notice by the prime contractor?

Appellees state that appellant is urging the Court to overrule its own decision in the case of *Bowden* v. *United States For the Use of Malloy,* supra, and follow the earlier decision of the Fifth Circuit in the case of *Houston Fire and Casualty Insurance Company* v. *United States For the Use of Trane Company,* C.C.A. 5th Cir., 1954, 217 F.2d 727.

This is not correct. Appellant is urging this Court to distinguish the rulings in the *Bowden* case, in which the question of oral notice was not involved, in the light of the rulings necessary to that case and the facts in the present case, and to follow the decision in the *Houston* case, giving due consideration to the liberal interpretation in *Fleisher Engineering & Construction Co.* v. *United States For Use and Benefit of Hallenbeck,* N.Y. 1940, 61 S.Ct. 81, 311 U.S. 15, 85 L.Ed. 12, 14; *Liebman* v. *United States For Use of California Electric Supply Co.,* C.C.A. 9th Cir., 1946, 153 F.2d 350, 352; *Hawaii* v. *Mankichi,* 190 U.S. 197, 213, 23 S.Ct. 787, 47 L.Ed. 1016, 1021; and *Coffee* v. *United States for Use and Benefit of Gordon, C.C.A.* 5th Cir., 1946, 157 F.2d 968, 969; all cited in appellant's opening brief.

As appellant pointed out in its opening brief, the writing referred to in the *Bowden* case was sent by the subcontractor to the prime contractor, and the supplier had given no notice, oral or written, to the prime contractor. Furthermore, the Court pointed out that nothing in the letter informed the prime contractor that the supplier expected the prime contractor to pay the bill. Thus, the fact situation in the *Bowden* case can be clearly distinguished from the fact situation in this case, and Judge Walsh clearly based his decision on the facts (1) that there was no notice, oral or written, from the supplier to the prime contractor, and (2) that nothing in the letter informed the prime contractor that the sup-

plier expected the prime contractor to pay the bill. Therefore, the decision in the *Bowden* case should not control the decision in this case where (1) there is specific and unquestioned evidence of the giving of the oral notice by the supplier to the prime contractor, (2) there is written unquestioned evidence of the receipt of the oral notice by the prime contractor, and (3) no question exists as to the sufficiency of the notice.

Appellees state they believe this Court in the *Bowden* case misconstrued the *Coffee* case, since, as they say, the *Coffee* case did not hold that written notice to the prime contractor was unnecessary. What happened is that in the *Coffee* case the court said (157 F.2d 968, 969):

> "Written notice is required to prevent misunderstanding and to afford certain evidence of the communication. The provisions for service afford means of making certain the fact of notice given, or of making a good service where the contractor can not be reached personally."

And this Court in the *Bowden* case, in Note 9, cited the *Coffee* case in support of its statement (239 F.2d 572, 577) that:

> "The giving of the written notice specified by the statute is a condition precedent to the right of a supplier to sue on the payment bond; the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill."

The decisions in the *Bowden* and *Coffee* cases can be reconciled. Each required a notice from the supplier to the prime contractor. Each required a writing to afford certain evidence of the communication. And, although the *Bowden* case requires that "the writing must be sent or presented to the prime contractor by or on the authority of the supplier," this obviously was prescribed to rule out the notice in the *Bowden* case which was from the subcontractor to the prime contractor, not from the supplier to the prime contractor. If the word, "notice," had been used instead of the

word, "writing," there would have been no difference in the rulings, and appellant submits there is no essential difference in the rulings.

On page 25, appellees state that in the *Bowden* case the claimant on numerous occasions notified the prime contractor of the claim and numerous conferences were held in attempts to obtain payment. This is correct, but these notices and conferences were before the subcontract was completed and before the last payment by the subcontractor to the claimant. Thus, appellees' reasoning on this point is fallacious.

Appellee calls attention to the fact that the Court in the *Bowden* case, in Note 10, called attention to the *Houston* case, but did not consider the case soundly decided and, accordingly, did not follow it. However, it is obvious that this comment was made because, in the *Bowden* case, the notice was not given by the supplier to the prime contractor, and under that circumstance it could not well follow the *Houston* case.

Then appellees attempt to show that the oral notice to the prime contractor on March 19, 1957, was not given within ninety (90) days after the last of the material, furnished to Pioneer Constructors, was delivered on the job. They point out that the lower court found that the last of the material furnished to Pioneer Constructors and used by it was delivered prior to November 4, 1956, and, in any event, prior to December 4, 1956.

However, the lower court found that Pioneer Constructors ceased work on October 31, 1956 (Finding 10; R 69, 70), and that on January 8, 1957, the subcontract of Pioneer Constructors was formally terminated (Finding 11; R 70). How, then, could it find that material delivered from November 1, 1956, to December 4, 1956, when Construction Material Company was performing the work, was furnished to and used by Pioneer Constructors, without finding that material delivered from December 5, 1956, to January 8, 1957, also was furnished to and used by Pioneer Constructors. The lower court's findings on the subject are clearly erroneous. It apparently was confusing the dates with respect to Pioneer Con-

structors' responsibility and liability on the job under its contract, with the dates with respect to notice which it imputed to appellant.

Appellant respectfully submits that, without regard to any notice or knowledge it may have had, Pioneer Constructors was the subcontractor on the job until January 8, 1957; the Construction Materials Company subcontract was not executed and delivered until that date; Ashton-Mardian Company held Pioneer Constructors responsible until that date; and Ashton-Mardian Company withheld payments to Construction Materials Company until after that date, when its bond was furnished. (R 125, 126) There was a delivery to the Ajo job on December 20, 1956, that delivery was the last one before January 8, 1957, and the oral notice on March 19, 1957, was within ninety (90) days from that delivery.

CONCLUSION

Appellant respectfully submits that appellees have failed to refute the facts and arguments presented by appellant in each of the three separate and different cases presented by appellant in its opening brief, under each of which appellant is entitled to judgment.

Therefore, judgment for the prime contractor and its surety should be reversed, and the District Court should be ordered to enter judgment against them and in favor of appellant.

Respectfully submitted,

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